

# Matters Of Judgment

Illustration by Barry Downard

The contemporary discussion surrounding judicial independence has generated strong feelings—and often vitriolic debate—among legislators, pundits, litigants and judges themselves. In the provocative essays that follow, two faculty experts in Constitutional law bring new insights to an issue so crucial to the American judicial process.

Sherrilyn Ifill's states that too much of the current debate has focused on

protecting judges. Her essay argues that the protection of litigants' due process rights is the true animating need for an impartial judiciary.

Taking the long view, Mark Graber looks over the Supreme Court's vast 204-year history and concludes that, more often than not, the branch believed to be a forum of principle rather than politics has demonstrated no more constitutional fidelity than elected officials.







# Give Due Process Its Due

By Professor Sherrilyn Ifill

At its core, judicial independence is not about protecting judges. It's about protecting litigants and citizens.

This is perhaps not a popular thing to say to judges, but too much of the debate and discussion about judicial independence has focused on judges. Case in point: In January 2007, the Chief Justice of the United States in his Year-End Report on the Federal Judiciary to Congress issued a compelling brief for preserving and promoting judicial independence. But the context of this discussion caught some on the raw.



Chief Justice Roberts's speech on judicial independence focused entirely on the admittedly important issue of the need to increase the salaries of Article III judges. Without question, and as ably demonstrated by the Chief Justice, federal court judges are long overdue for pay raises (as are many state court judges).

The failure to increase the pay of Article III judges may indeed ultimately compromise the quality of the bench. But here was an opportunity for the Chief Justice to talk about judicial independence with Congress—the body from which many of the most troubling challenges to judicial independence have arisen. From calls during the late 1990s for the impeachment of federal judges who issue unpopular decisions, to the 2005 legislation passed by Congress at midnight to remove one case involving the high-profile matter of ending life support for patient Terri Schiavo from state court jurisdiction to that of the federal court (legislation later described by one judge on the federal circuit court that refused to overturn the state court's decisions in the case as “overstepping constitutional boundaries”), Congress has often taken a leadership role in fostering the view that judges should be penalized for failing to render decisions

that reflect the popular will. Nevertheless Chief Justice Roberts, in his address to Congress, chose to use the language of “judicial independence” to make his case about judicial pay raises, going so far as to describe the threat to judicial independence caused by insufficient pay as reaching the level of a “constitutional crisis.”

To my mind, this focus failed to properly identify and emphasize what is at stake when the independence of the judiciary is threatened. Judicial independence is at its core designed to protect litigants and citizens. It has its roots in separation of powers, yes, but it is also compelled by the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution. At its core, the right to due process guarantees litigants the right to appear before judges who are impartial, and who are free of influences that might result in bias or prejudgment of a case. So important is this due process right that the Supreme Court has held that even the appearance of partiality or bias entitles a litigant to seek recusal of a judge and require a judge to withdraw from a case. As the Supreme Court famously said nearly 80 years ago in *Offutt v. United States*, “justice must satisfy the appearance of justice.”



So important is due process that the Supreme Court has held that even the appearance of partiality or bias entitles a litigant to seek recusal of a judge.

On state courts, there are troubling signs that unfettered speech by candidates in state court judicial elections may be having a negative effect on the protection of due process rights of criminal defendants. Several studies have shown that “elected state supreme court justices are more likely to affirm jury verdicts imposing the death penalty in the two years before the end of their terms than at other times.” Yet another study showed that, in the 1980s, “state supreme courts with judges elected by the legislature or in contested voter elections affirmed death penalty sentences in more than 62 percent of the cases ... [while] state supreme courts comprised of judges appointed for life terms affirmed death sentences in only 26.3 percent of the cases.” A recent study of judges in one state suggests that judges’ sentences become harsher “as re-election nears.” If the conclusions of these studies are even partially accurate, then the threat to judicial independence posed by the increasingly volatile rhetoric in contested and retention judicial elections is, at its core, a threat to due process.

The concern for due process is not limited to the criminal context. High profile civil cases, involving popular local defendants or plaintiffs, large employers in the local jurisdiction, or hot-button issues like child custody for gay parents, same-sex marriage or granting judicial permission for minors to obtain abortions, may also be cases in which judges find themselves deciding cases with an eye toward an upcoming election campaign.



Due process protects not only litigants. All citizens in a society governed by the rule of law must have confidence in the judiciary, in order for the judiciary to maintain its legitimacy. The public might agree or disagree with a court’s ruling, but citizens are more likely to comply with the rule of law when they believe that the judges are acting independently and legitimately in their determination of what the law is.

Moreover, decisions in cases between individual litigants often have an impact on the lives of everyday citizens, whether it’s a case seeking damages against a tobacco company, challenging the right of the city to impose speech restrictions on billboards, or the right of police to use certain forms of force or interrogation. Thus, the public is deeply invested in ensuring that the due

process rights of litigants to appear before judges who are impartial and who can act without fear of reprisal or retaliation, is protected.

*Professor Sherrilyn Ifill is nationally recognized as an advocate in the areas of civil rights, voting rights, judicial diversity, and judicial decision-making. She has appeared on NBC Nightly News as well as local network news broadcasts as a consultant and expert during Supreme Court confirmation hearings. Professor Ifill also writes about the history of racial violence and contemporary reconciliation efforts. Her book about truth and reconciliation commissions for lynching, On the Courthouse Lawn: Confronting the Legacy of Lynching in the 21st Century, was released by Beacon Books in February 2007. This essay is adapted from a lengthier presentation, “Rebuilding and Strengthening Support for an Independent Judiciary,” that she delivered at the Pound Civil Justice Institute’s 2007 forum for state appellate court judges.*